

No. 8,996.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

The People of the State of California.

Respondent,

vs.

The Gold Run Ditch and Mining Co.

Appellant.

POINTS AND AUTHORITIES

ON BEHALF OF RESPONDENT.

STABLER & BAYNE,

Of Counsel for Respondent.

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spondent.

It appears from the testimony that the streams were all clear before mining began, and that their overflow left little or no deposit, and that what there was, it being natural wash, was beneficial ; that since mining began the streams have grown muddy, their beds have filled, and that the evil

has been and is constantly increasing, by reason of both the greater quantity and coarseness of the material. The witness Hoag testified that, coincident with the deep mining in heavy material, he had noticed the water change and grow more muddy in both the Sacramento and American rivers; most so in the American; that the change had been gradual, but more rapid during the last (preceding the trial) five or six years—from six to eight years. The witness Crocker also said that the sand coming down the last few years (preceding the trial) had been coarser each year and increasing in quantity. The witnesses Sheldon, Rooney and Gwynn testified to seeing even rocks and cobbles moving down in the American River, and Captain Foster said that he had noticed very little sand below Sacramento in 1849. It further appears that the effect of the deposit of this mining detritus and debris (sand, slickens, etc.) is most injurious; that nothing will grow upon it; that it is destructive of agriculture, and that this is certainly so at first and until its effects are neutralized by time or other means; that the natural drainage of the land is destroyed; that the water-level is raised in the land which is thereby kept cold; that crops cannot be put in; that orchards, etc., have been and are being destroyed; that roads have been washed out, destroyed, and rendered impassable; that navigation has been impeded; that the deep “reaches” in

the rivers have been filled up; that the obstructions in early days were not serious, but have since become so; that now there are large bars where before there were none; that moving shoals or bars form in the Sacramento River; that vessels which came to Sacramento City in 1849 can not now come there, and that the bays are also filling—one-third of which Hamilton Smith, Jr., seemed to concede to be due to mining.

It further appeared, from the testimony, particularly that of Will S. Green and John Bidwell, that there is no fill in the Sacramento River where there is no mining, although there are vast agricultural and stock raising interests in the territory drained by it.

Whence comes this sand, etc., which is filling these rivers? The evidence shows that there is little or no farming along the North Fork of the American River, and that it passes between high and even precipitous hills, and yet it is filled. It appears that the sand washes along down and fills the bed of the American River; that at times waves roll along, having the appearance of being almost solid sand; that this sand, etc., washes from the American into the Sacramento River; that in times of flood and high water these rivers both scour out their beds, and then they are promptly refilled to a depth as great as, or greater than before. Is there any ground for even a suspicion that "natural wash" could be the cause of

all this ? It seems like trifling, or worse, to suggest it. Natural wash is gradual ; this is most rapid. Natural wash is small in amount ; this is overwhelming. Natural wash requires careful measurements and observations to detect ; this changes the face of the country in a little while. Natural wash is fine and fertilizing ; this is coarse and destructive. (See remarks made and figures given by State Engineer Hall in his "Report to the Legislature of the State of California, Session of 1880," Part III, pages 29 to 31, in evidence in this case.)

The wash from the hydraulic mines can alone account for it, and we may well conclude, with Engineer Allardt, that the chain of sand, etc., is so continuous from the mines to the Sacramento River that we would say it undoubtedly came from the hydraulic mines, the bars, etc., being washed out and refilled each year ; and, there being no mines of any consequence below, we naturally conclude that the material comes from the hydraulic mines.

But does any of the deposit in the Sacramento and American Rivers come from the recent washings of the Gold Run Mine ? Defendant's (appellant's) witnesses were almost frantic in their efforts to establish the negative ; but two of them—Uren (an engineer) and Beers—testified that the blue gravel, in which are the present workings of that mine, washes quite readily after being

blasted ; and Beers admitted that it muddied the water considerably, and State Engineer Hall testified that the material in the samples taken by him from the American River, was similar to that in the Gold Run Mines. In addition, it appears that the cement, in which lies the gold, is composed of fine material, and has to be and is thoroughly pulverized, in order to get the gold out.

Hamilton Smith, Jr., describing the drainage area of the American River, shows that it is like an immense fan (some 2150 square miles in extent, the mountain drainage area being between 1900 and 2000 square miles), describes the escape of the water collected from this vast surface through the narrow gorge at Folsom (which gorge is only some 280 or 290 feet in width at extreme high water mark); Testimony, Vol. XX, p. 5645-6-7, and again, Testimony, Vol. XX, p. 5647-9, describes the causes of floods in the valleys of the Sacramento and American Rivers, and shows with what fearful power these enormous volumes of water come down, and hence their immeasurable washing and grinding power.

Mr. Smith says further, that, in his opinion, there are now in the beds of the Bear, Yuba and American Rivers 350,000,000 cubic yards of heavy material, which most of appellant's witnesses claimed was so heavy and of such character that it would never be removed by any natural force, but Mr. Smith, though a leading partisan,

remembered that something was due to scientific truth and facts, to say nothing of anything else, and conceded that sooner or later the whole of this mass would be brought down by the action of the waters, and even went so far as to state that
 * * * "the larger part of this 350,000,000 yards is constantly moving during the Winter floods. (Testimony, Vol. XX, p. 5639-43.)

Many, if not all, of appellant's witnesses testified that the material in which appellant has been working since it acquired the mines here complained of, is so very heavy that it would make a permanent lodgment in the bed of the river almost as soon as it got there, and that it certainly would not go below Rice's Bridge (above which, by the way, no mines were being worked except those of appellant); that the deposit below that point was the result of the "early washings" in said mines, and before their acquisition by appellant. It appears, however, from testimony in the case (describing among other things the pillars left standing from the "early washings") that *a large portion*, to say the least of it, of the "early washings" were in material which was quite as heavy as that now sought to be washed, and certainly no finer than the present material has to be made in order to get the gold out; we would be more than justified in placing the portion of such material which was taken out in the "early washings,"

and which was as heavy as that more recently worked, at fifty *per cent* of the whole amount taken out in said "early washings," but for the present let us put it at only twenty *per cent*. Gould, who is appellant's superintendent, and Uren, an engineer, and both of them appellant's witnesses, estimate the total amount of such "early washings" to be 67,000,000 cubic yards (others place it higher). Uren estimated the total amount of appellant's washing for the six years preceding the trial, and in this heavy material, to be only 4,389,791 cubic yards (others place it higher, also); taking those figures and remembering the testimony of appellant's witnesses we would expect to find not less than 17,789,791 cubic yards of the material in the river between the dump of defendant and Rice's Bridge; but in fact, Uren testified that there was substantially no deposit between the outlet of the mine and Pickering's Bar (the fall and current being so great that all had been washed away), and that between Pickering's Bar and Rice's Bridge there were only 9,361,691 cubic yards of material deposited. What then had become of the other 8,328,100 cubic yards of matter that was so heavy that it would not wash beyond Rice's Bridge? And if we place the heavy material in the "early washings" at only ten *per cent* of their total, the deposit between Pickering's Bar and Rice's Bridge would still leave 1,728,100

cubic yards of material unaccounted for, upon the appellant's theory, and if we remember the effects which appellant's witnesses claimed for "natural wash," the operations of frost, etc., there is no telling how many million cubic yards of material there would then remain unaccounted for.

But suppose that none of the material thrown out by appellant's operations has or will come down into the lower American, or into the Sacramento River. Hamilton Smith, Jr., in his testimony (Testimony, vol. 20, pp. 5607-10, 5611-12), showed that the deposit of the heavy material thrown out by the present washings filled the beds of the river in the upper portions and caused the banks and bars, and old deposits from the "early washings," to wash out and come on down, which is as bad as if the injurious matter came directly from the recent operations of appellant itself.

Mr. Smith added, however, that if all mining should now stop, there would be no relief for years because of existing deposits which are bound to come down; he also referred to the injury resulting from natural wash. But the fact that I suffer from a disease which has become chronic, is no reason why some one else should so treat me as to postpone indefinitely my recovery; the fact that my condition is naturally delicate, or is so from previous injuries, is no reason why a final

and fatal blow should be struck, or any further injury inflicted.

As to wash from agricultural operations, it is only what is unavoidable and purely incidental; it is not sought, or desired; besides, it is light, will pass off readily, is comparatively small, insignificant in quantity, and is of that character which does little or no damage, but, on the contrary, is almost invariably beneficial to any land upon which it is deposited.

The Attorney-General has a right to bring actions to enjoin public nuisances.

2 High on Injunctions, 2d ed., Sec. 1554 and cases cited.

Yolo Co. vs. Sacramento Co., 36 Cal. 196 and cases cited.

3 Pomeroy's Eq. Jurisprudence, Sec. 1349 and cases cited.

No statutory authority was necessary to empower the State to begin this action.

Peo. vs. City of St. Louis (5 Gilman 351) 48 Am. Decisions, 339, 346.

The fact that others contribute to a nuisance is no defense; nor is the fact that defendant's contribution is very small.

Woodyear vs. Schaefer, 57 Md. Rep. 1.

Richmond Manufacturing Co. vs. Atlantic DeLaine Co., 10 R. I. 106; S. C., 14 Amer. Reps. 662.

Hill vs. Smith, 32 Cal. 167-8.

An injunction against a nuisance may be maintained, although other persons than the defendant are committing nuisances of the same kind and though the plaintiff has bought out such as had acquired rights against him.

Hilliard on Injunctions, 315, Sec. 12 b, citing **Crossly vs. Lightowler**, 3 Law Rep. (Eng.) Eq., March 1867, pp. 277, 279, and **Acc. St. Helens vs. Tipping**, 11 H. C. L. 642.

* * * "Neither is the exercise of this power" (injunction against nuisance) "prevented by the fact that the party complaining may have a remedy by indictment or by an action at law."

Penn. Lead Company's Appeal, 96 Penn. St. 116; S. C., 11 Reporter 246, and 42 Am. Reps. 534.

Yolo Co. vs. Sacramento Co., 36 Cal. 195.

Prescription.

No lapse of time legalizes a public nuisance.

Civil Code of California, Sec. 3490.

Wood on Nuisances, Secs. 724, 726, and cases cited.

4 Wait's Action and Defences, 782 and cases cited.

Peo. vs. Cunningham (1 Denio 524), 43 Am. Decisions 717.

To establish a prescriptive right to commit a nuisance in any instance, it is necessary to show the *same injury* and to the *same land* during the *whole time*.

Wood on Nuisances, Sec. 706 and cases cited.

4 Wait's Actions and Defenses, 782-3 and cases cited.

The Statute of Limitation.

Have no application in this case, and that is particularly the case so far as injury to a navigable stream is concerned. It has been held by the Supreme Court that where property is held by a municipality, or by the State, not as a private proprietor, but in trust for the public use, "the statute of limitations was not intended as a bar to the assertion by the public of rights of that character. * * * It (the property there in question, to wit, a public square) was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to private per-

sons, and is effectually withdrawn from commerce; and the city having no authority to convey the title, private persons are virtually precluded from acquiring it. The land itself, and not the use only, was dedicated to the public. Land held for that purpose, whether held by the State or a municipality, in our opinion, is not subject to the operation of the statute of limitations."

Hoadly vs. San Francisco, 50 Cal. 274-6.

Such being the principle as to public squares, it is, if possible, more clearly and emphatically applicable to navigable rivers.

License.

It is claimed that by giving permission to mine, and more particularly by the sale of mining claims, a license has been given by implication, not merely to mine, but also to do whatever is necessary, or even convenient, in the prosecution of mining, even though it may result in the destruction of agricultural lands, etc., in the valleys, and of the streams and navigable rivers.

To that we may reply, that provision was made for the sale of agricultural lands, and they were actually sold before mining lands (**Act of Admission, 1 Brightly's Digest, p. 110, Sec. 28**); and that the implied license to farm and to

be protected in it is at least equally as strong as that in favor of mining.

Many cases were cited by one of the most eloquent and able of appellant's counsel at the argument in the Court below, to show that all presumptions are in favor of the grantee and against the grantor; but the authorities were in cases where the grants were between private individuals, and he seemed wholly to ignore the distinction as to presumptions in such cases, and where the grant was from the king, or the State to a subject, or citizen, it is elementary law that in the last class of cases *all presumptions* are in favor of the grantor and against the grantee.

"The manner of granting by the king does not more differ from that by a subject, than the construction of his agents, wants when made :

"1. A grant made by the king, at the suit of the grantee, shall be taken most beneficially *for* the king, and *against* the party, whereas the grant of a subject is construed most strongly *against the grantor*; wherefore, it is usual to insert in the king's grants that they are made, not at the suit of the grantee, but '*ex speciali gratia, certa scientia, et mero motu regis*;' and then they have a more liberal construction.

"2. A subject's grant shall be construed to include many things beside what are expressed, if necessary for the operation of the grant; therefore, in a private grant of the profits of land for

one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted; and if a feoffment of land was made by a lord to his villein, this operated as a manumission, for he was otherwise unable to hold it. But the king's grant shall not enure to any other intent than that which is precisely expressed in the grant, as, if he grants land to an alien, it operates nothing, for such shall not also enure to make him a denizen, that so he may be capable of taking by grant.

"3. When it appears from the face of the grant that the king is mistaken; * * * or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law, in any of these cases, the grant is absolutely void."

**2 Blackstone's Com. (Chitty's Ed.) marg.
pp. 347-8, which see further.**

On a similar question the Supreme Court of the United States used the following apt language:

"Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public wel-

fare. It is axiomatic in the jurisprudence of this Court."

**Northwestern Fertilizing Co. vs. The
Village of Hyde Park (97 U. S. Rep.
666), 7 Reporter 226.**

The Civil Code of this State, Section 1069, simply declaring the common law rule, provides that * * * "every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor." But there is no room to contend for any implied license so to mine as to destroy, or even injure, navigable rivers, for the United States have always, from the earliest period down to the present, provided by express statutes, that navigable rivers lying within territory disposed of by it should be and remain public highways.

**Yale on Mining Claims and Water
Rights, 379.**

1 Brightly's Digest, p. 500, Sec. 232; p. 817, Secs. 1-4; and p. 105, Sec. 2.
Revised Statutes U. S., Sec. 2476.

California also, from the earliest period of its existence, has imposed penalties for in any manner obstructing the navigation of navigable rivers, and while some modified exceptions were made, none of them intimated or imagined any such

right or privilege by or on behalf of miners or mining.

Acts of 1850, p. 188, Ch. 74.

2 Hittell's General Laws, p. 686, Sec. 4660.

Penal Code, Secs. 370 and 611.

But even had California desired so to do, she could not have licensed any act that would destroy or seriously impair the navigability of her navigable rivers, for, by the Act of Admission, it was provided * * * "that all the navigable waters within the said State shall be *common highways*, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor."

1 Brightly's Digest, p. 105, Sec. 2.

1 Hittell's Codes, etc., p. 56, Sec. 3 (bottom p. 68).

For a construction of similar language, see

Peo. vs. City of St. Louis (5 Gilman 351),
48 Am. Decisions, 341, 342-3.

Hence, even if the Legislature, or any other body or individual professing to act on behalf of the State, had attempted or pretended to give any such license, it being void for want of authority, the State would not be estopped to contest its validity.

**McCullough vs. Board of Education, 51
Cal. 418, and cases cited in argument.**

And where, we may ask, would the United States rest any claim of authority or right in them to destroy the navigability of a river, especially of one wholly within the territorial limits of one State? It certainly cannot be based upon the power to regulate commerce.

If the United States and California have dedicated the streams, etc., to the uses of miners, and appellant claims that there has been such dedication, what is the necessity for, or sense in, such enactments as are contained in the Acts of the Legislature of California of the session of 1869-70, p. 571, Sec. 9?

But it is claimed that miners have been licensed to inflict all the injuries complained of, because the industry has been taxed from time to time, and in different ways; but mere taxation is no license, nor any sign of favor, or even of forbearance, necessarily.

**Youngblood vs. Sexton (opinion by Cooley, J.)—[32 Mich. 406]—20 American
Reports 664, 665, 666-7, 667 and 667-8.**

It was contended in the Court below that by reason of the acquiescence, silence, etc., of the United States, the rights of miners, ditch-owners and others to the use of streams, water-ways and whatever else was necessary to the prosecution of

mining, had become vested, so that the United States, even if they desired, could not divest those rights, and were estopped to deny their existence, but in **Jennison vs. Kirk**, 98 U. S. 460; **S. C. in 8 Reporter**, p. 4, near end, Mr. Justice Field, in commenting on Sec. 9 of the Act of Congress of July 26, 1866, after stating the views of the author of the bill as to mining rights and the effects of the bill itself, said: "Whilst acknowledging the general wisdom of the regulation of miners, as sanctioned by the State and moulded by its Courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, *although then recognized by the local customs, laws and decisions, would be thereby destroyed unless secured by the Act.* And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners."

It is manifest that the rights of miners, as such, rest in the statutes and must be drawn therefrom; whereas, if the claims of the miners, as here made and sought to be established, are

recognized, the *local* customs, rules and regulations of an insignificant mining district (and they have never been recognized, either by statutes or decisions, as having any other than *local* operation) become general laws, and of such importance as to overrule constitutions, statutes of the United States and the State, and the decisions of all the Courts, and, besides, are made to apply to subjects and in ways never dreamed of before, and all from some fancied idea of *tacit* consent and estoppel.

Estoppel, as against the sovereign or the State, is not favored, for reasons which have been suggested, and which readily occur to the mind; and the same may be said concerning tacit consent.

Saunders vs. Hart, Sprm. Crt. Tex., Austin Term, 1882, 14 Reporter 540.

But even supposing that there had been any attempt on the part of either the United States or the State to confer any such power or right as is here sought to be established or maintained, see, for a most clear distinction between the cases of a *statutory authorization only* and a *statutory duty*, where the act authorized is not *at first* a nuisance, but *subsequently* becomes so, and *then not by reason of the acts of the defendant, but of others*:

Atty-Gen. vs. Bradford Nav. Co., 6 Best & Smith, 631 (118 Eng. Com. Law Rep. 631.

The best and fullest report of said case is under the title of—

Reg. vs. The Proprietors of the Bradford Navigation Co. et al., The Jurist, New Series, Vol. II. Part I, pp. 766, 770, and 771.

But let us suppose that defendant acts under statutory authority, then see, as to the extent of the defense afforded by such authorization, the care, skill, safeguards, etc., which are requisite :

4 Wait's Actions and Defenses, 785.

Wood on Nuisances, Secs. 746-7 (and the many cases cited in each work.)

McAndrews vs. Collerd, 13 Vroom. 189. S. C., 36 Am. Rep. 509.

Appellant claimed that efficient restraining dams could be built for about one fourth of one *per cent* of the value of the mining property involved, and urged that as a reason why mining operations should not be enjoined. But is it not one of the strongest reasons why they should? Inflicting such enormous injury upon individuals and the public in the pursuit of mere private gain, yet neglecting to erect and maintain safeguards which, according to appellant, would be so easily made, so cheap, and so efficient. Having already, according to their own showing, manifested such reckless and criminal disregard of the rights of

other individuals and the public, why should the sufferers from the acts of defendant and its fellows be compelled to lie idly down in terror while their despoilers *experiment*? It is a mere experiment, or would be, and, by appellant's own admission, it so appears. The anticipation of gain leads to bright, strong hopes, while the dread of further suffering and loss, with no chance of gain, causes doubt.

A business, etc., may become a nuisance (by reason of the settlement of the country, etc.) which formerly was not, and in such event it must give way.

Northwestern Fertilizing Co. vs. Hyde Park, 97 U. S. 668-9; (S. C., 7 Reporter 227-8.)

At page 664 (97 U. S.), the Court say: "The chemical works of the company are in Cook County, south of the dividing line of Townships 37 and 38, *as required by the charter. When put there, the country around was swampy and nearly uninhabited, giving little promise of further improvement.*"

Customs.

To be valid, must be, 1st, ancient; 2d, uninterrupted; 3d, peaceable; 4th, reasonable; 5th, certain; 6th, obligatory; and 7th, consistent.

Clarke's Brown on Customs and Usages.

Lawson on Usages and Customs.

Yale, in the table of contents of his work on "Mining Claims and Water Rights," p. viii, gives a synopsis of the Miners' Rules and Regulations, but none of them relate to the mode, etc., of *working* claims.

For the rules and regulations which the United States statutes authorize the miners to make, see

Act of May 10, 1872, 17 Stats., p. 91, Sec. 5 (same in Hart's Mining Stats., p. 37, Sec. 5; Revised Stats., Sec. 2324, Hart's Stats., p. 11.

But none of them apply to the mode of *working*, or to *dumps*, *easements*, etc.

Rules Governing Working of Mines, Easements, etc.

The Act of Congress of July 16, 1866, Sec. 5, provided that in the absence of necessary legislation by Congress, the local Legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; this was made a condition of the sale, and the Act provided further, that "those conditions shall be fully expressed in the patent." The same

provision was incorporated into the Revised Statutes, Sec. 2338.

Hart's Mining Stats. p. 32, Sec. 5 ; p. 19, Sec. 2338.

The same conditions applicable to vein and lode mines were, by the Act of July 9, 1870 (Vol. XVI, p. 217, sec. 12), and the Revised Statutes, sec. 2329, made applicable to placer mines.

Hart's Mining Stats. p. 34, Sec. 12 ; p. 15, Sec. 2329.

But nothing is anywhere said about the customs, rules, regulations, or usages of mines or miners on that subject.

Unreasonable or Unlawful Customs, etc.

The statutes of the United States, and also of California, require mining rules, regulations, etc., to be lawful, not in conflict with the constitution, laws, etc.; but the claims here made would violate constitutions, statutes and the common law as to taking private property, the rights of property in general, the navigation of rivers, etc. And let us remember that the pursuit, to wit, mining, in favor of which all this is claimed, is a private one and for individual gain ; as purely so as manufactures, farming or any trade.

The fact that mining cannot be carried on with-

out polluting streams gives no right to so pollute without compensation (and we may add, certainly, none in any event to destroy the navigability of a river). The importance of an industry makes no difference. A custom justifying such disturbance of private property (and of public, too,) would be unlawful and, therefore, worthless; it would be not only "superior to the supreme law of the land, but one reaching even beyond the possible sovereignty of the State, in that it would empower private persons for private purposes to injure or destroy private property (and in this case public property, also), and that without compensation. A custom such as this is radically bad and cannot be sustained."

**Penn. Coal Co. vs. Sanderson, Sup. Court
of Penn., May 3, '80, 10 Rep. 316.**

Nay, more; it would permit private persons to take for private purposes, by virtue of *local* customs, usages, rules and regulations, property and rights which the Supreme Court held in **Hoadly vs. San Francisco, 50 Cal. 274**, cited above, could not be granted or diverted from the purpose to which it was originally directed, by even the State itself.

A party's right having been fixed by the "rules of property, which are a part of the general law of the land, could not be divested by any mere neighborhood custom or regulation."

Waring vs. Crow, 11 Cal. 372.

See also:

Lincoln vs. Rodgers, 1 Montana 217, 224.

A case clearly put and directly applicable here.

The statute of California, as to proof of customs, usages and regulations in actions respecting mining claims, applies only to local and not to general customs, usages and regulations.

Acts of 1851, p. 149, Sec. 621.

2 Hittell's Gen. Laws, Sec. 5552.

Code Civil Procedure, Sec. 748.

T. M. Tunnell Co. vs. Stranahan, 31 Cal. 393.

The customary law of miners is not applicable to controversies between them, or ditch owners, and occupants of the public lands for agricultural or grazing purposes (and if not in the case of mere occupants, we may surely conclude that it is not in the case of those who own the fee).

Note of Field, J., to his opinion in Jen-
nison vs. Kirk, 98 U. S. 453.

S. C., 8 Reporter 5, and 3 P. C. L. J. 239.

The rule as to *priority of appropriation* depends on the *absence of actual title*.

Yale's Mining Claims, etc., 170-1, 174
at top.

The State had actual title to the swamp lands; not only so, but they were really granted to her in trust to secure *their reclamation* for useful and beneficial purposes. She also held and holds the navigable rivers in trust for the use of the public. In each case she is bound by the highest obligations, moral, equitable and legal, not only to do nothing injurious herself, either directly or indirectly, but, if need be, to interpose actively to prevent injury by others.

Is there any principle upon which appellant can justify depositing its tailings in navigable rivers, or upon the lands of others, or where they will get there? The remarks of the then Chief Justice, Field, in **Biddle Boggs vs. Merced Mining Co.**, 14 Cal. 379, might, with some changes, be most aptly used in this connection. "The doctrine of an unlimited general license—put forth in many instances, and advocated by the defense—is pregnant with the most pernicious consequences. If upheld, it must lead to the spoliation of landed estates, under the pretense of mining, without possibility of protection or redress on the part of the owner. * * *

There is something shocking to all our ideas of the rights of property in the proposition." * *

But appellant says that if this action is maintained, all mining must cease. Suppose it must, but we are not driven to meeting that proposition. In **Robinson vs. Black Diamond Coal**

Co., 57 Cal. 413-4, this Court said: "But the plaintiff's evidence, as we view it, tends to prove another and very material fact, viz: that said refuse matter was the product of the defendant's mining operations, and was deposited in said creek through agencies controlled by the defendant; and that, although it was not responsible for the inundation of the plaintiff's land by the water of said creek, it was responsible for the deposit of the deleterious substances with which said water was charged, through its agency, upon said land. *This does not, in any manner, involve the question of the defendant's right to mine, or prosecute any other legitimate business upon its premises.* It would not be claimed that the defendant could convey and deposit refuse matter from its mine upon the plaintiff's land by means of carts or cars, without incurring liability for any damages which the plaintiff might suffer by reason thereof. And we know of no principle, upon which it could be held, that a person may escape liability by doing that indirectly which would render him liable if done directly."

But the defendant says that its business is lawful in itself; that it is conducted according to the most approved plans, and that it is necessary for them to do as they have done. To that the reply is that it has created a nuisance, and that must be stopped.

Peo. vs. Cunningham, (1 Denio 524), 43
Am. Decisions, 711-5.

The defendant appealed for consideration on account of the great outlay of capital involved in mining operations, the numbers of people employed and dependent thereon, the magnitude of private and so-called public interests involved, and the necessity for such operations. As to the numbers employed, it is well known that great mining corporations, like the defendant, have driven out population from the mining districts, and it was almost the boast of not a few of appellant's witnesses that the improved appliances for mining operations, while removing as much material as ever, lessened the necessary number of employes. As to the importance of the industry, it has been well said that the public is more or less interested in all productive industries; the poor and weak alike with the rich and powerful are entitled to protection, and to the Courts all must and do look for the enforcement of their rights. It has been well said: "The consequences that would flow from the adoption of the doctrine contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations, in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions."

See, for most emphatic replies to all such pleas:

Wood on Nuisances, Sec. 794.

Penn. Lead Co.'s Appeal, (96 Penn. St. 116), S. C., 42 Am. Rep. 538-9; 11 Reporter 247.

In this last case there was a finding (as reported in 11 Reporter 246) "that the defendant's works had a larger capacity than any other in the United States; that it took every known precaution for the prevention of escape of lead from the flues," etc.

See, also, the very clear and forcible remarks on such defenses in—

Sanderson vs. The Penn. Coal Co., 86 Penn. St. 408-9; S. C., 27 Am. Reps. 717-8.

See, also, remarks in same case (86 Penn. St. 408; 27 Am. Rep. 716-7) of the Court on the case of the **Little Schuylkill Navigation Co., 7 P. F. Smith 142**, which was much relied on in the Court below by defendant, showing that said case considered simply a question of joint and several liability, but no question as to whether "the defendants had the right to use the river bed as a dumping-ground for the rubbish of their mines."

Appellant, in the Court below, dwelt much on the benefits accruing to the public at large from

the operations of itself and of its fellows; on the necessity of gold to commerce, etc.; but if they create a nuisance, especially by interfering with the navigability of a river, such considerations cannot be taken into consideration by a Court, however strongly they might appeal to legislative discretion in proper cases, and the evidence tending to prove them is irrelevant and immaterial.

People vs. City of St. Louis (5 Gilman 351) 48 Am. Decisions 344-5, 346-7.

Gold vs. Carter (9 Humphreys 369), 49 Am. Decisions 712.

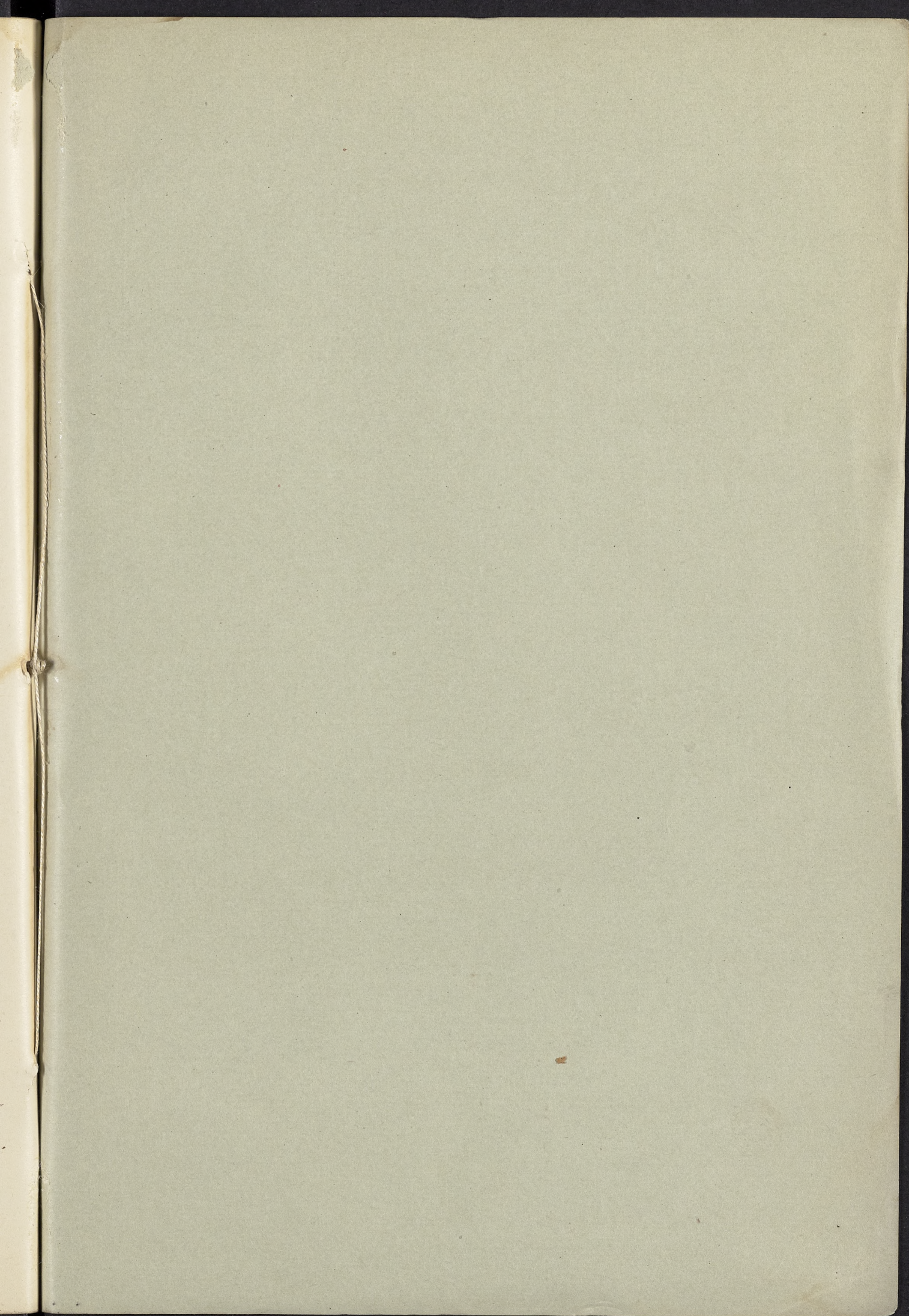
Respectfully,

STABLER & BAYNE,

Of counsel for Respondent.

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Geo. H. Byrne,
W. C. Belcher,

Attorneys for Appellant.